81-2254

No._____

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In the Supreme Court of the United States

October Term, 1981

STATE OF NORTH DAKOTA

Respondent,

vs.

RALPH H. GELVIN

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

ROBERT J. SNYDER
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QUESTION PRESENTED

Whether the North Dakota Supreme Court erred as a matter of law, to the prejudice of Ralph H. Gelvin, in reversing the trial court's Order suppressing as evidence a certain alleged illegal substance, seized from the defendant's wallet during a warrantless jailhouse inventory search thereof, thereby denying Ralph H. Gelvin of his constitutional right against unreasonable searches and seizures, pursuant to the Fourth Amendment to the Constitution of the United States?

PARTIES

All parties to this proceeding are set forth in the caption hereof.

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Cases ..... iv-v

Statutes v

Opinions Below 2

Jurisdiction 2

Constitutional Provisions Involved 2-3

Statement of the Case 3-5

Reasons for Granting Writ:

I. Considerable Conflict and Confusion Exists Between the States and the Federal Circuits as to the Nature and Scope of the Jailhouse Inventory Search Exception to the Fourth Amendment Warrant Requirement 5-10

II. The Inventory Search of Gelvin's Wallet and the Seizure of the Alleged Controlled Substance therein, was an Unreasonable Search and Seizure Pursuant to the Provisions of the Fourth Amendment to the United States Constitution 10-14

Conclusion 15-16

Appendix:

Memorandum Opinion and Order Granting Gelvin's Motion for Suppression A1-A7

Decision of the Supreme Court of North Dakota A8-A19

Denial of Petition for Rehearing A20

Certificate of Service A21

TABLE OF CASES

PAGE

Arkansas v Sanders, 442 U.S. 753 (1979) 13, 14, 15

Dearing v State, 393 NE 2d 167 (Ind. 1979) 7

Kaufman v United States, 453 F.2d 798 (8th Cir. 1971) .. 6

Lyle v State, 600 P.2d 1357 (Alk. 1979) 7

People v Bayles, 411 NE 2d 1346 (Ill. 1980) 7

People v Brooks, 274 NW 2d 430 (Mich. 1979) 7

People v Redmond, 390 NE 2d 1364 (Ill. 1st Dist. 1979) . 7

People v Walker, 228 NW 2d 443 (Mich. 1975) 7

Reeves v State, 599 P.2d 727 (Alk. 1979) 7, 11-12

South Dakota v Opperman, 423 U.S. 364, (1976) 6, 10, 13

State v Daniel, 589 P.2d 408, (Alk. 1979) 12

State v Hall, 279 SE 2d 111 (N.C. App. 1981) 7

State v Kaluna, 520 P.2d 51 (Hawaii 1974) 7

State v Mabra, 213 NW 2d 545 (Wis. 1974) 8

State v Mordeszewski, 229 NW 2d 642 (Wis. 1975) 8

State v Scroggins, 210 NW 2d 55 (Minn. 1973) 8

United States v Bloomfield, 594 F.2d 1200
(8th Cir. 1979) 8-9

Table of Cases (cont'd)

United States v Chadwick, 433 U.S. 1 (1977) ... 13, 14, 15

United States v Monclavo Cruz, 662 F.2d 1285 (9th Cir. 1981) 9, 14

United States v Newman, 585 F.2d 355 (8th Cir. 1978) .. 9

United States v Passano, 624 F.2d 938 (9th Cir. 1980) ... 9

STATUTES

PAGE

Constitution of the United States —
Fourth Amendment 2
Article 14, Section 1 2-3

28 U.S.C. 1257 (3) 2

No._____

In the Supreme Court of the United States

October Term, 1981

STATE OF NORTH DAKOTA

Respondent,

vs.

RALPH H. GELVIN

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

TO THE HONORABLE: The Chief Justice and Associate Justices of the Supreme Court of the United States.

Ralph H. Gelvin, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Dakota entered into the above-entitled case on April 21, 1982.

OPINIONS BELOW

The Supreme Court of North Dakota having issued an Opinion in this case, a copy of which appears in Appendix A to this Petition at pages A8 to A19. The Opinion is officially reported at N.D., N.W.2d .

JURISDICTION

The Opinion of the Supreme Court of the State of North Dakota (Appendix A, pages A8 to A19) was entered on April 21, 1982. A timely Petition for Rehearing was denied on April 29, 1982. The jurisdiction of the United States Supreme Court is invoked pursuant to this Court's ability to review and decide any title, right, privilege or immunity specically set up or claimed under the Constitution of the United States. 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched. and the persons and things to be seized."

The Fourth Amendment to the Constitution of the United States is applied to the States through Article Fourteen, Section One, of the Constitution of the United States, which provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

During the early morning hours of April 2, 1981, officer Cliff Emmert of the Bismarck, North Dakota, Police Department, received a report of an incident at the apartment of one Shirley Hart in the City of Bismarck, North Dakota. Responding to the call, Officer Emmert observed Mrs. Hart lying on the floor in the hallway of the apartment, apparently in a semiconscious condition. He also observed Ralph H. Gelvin lying on the floor of the kitchen of the apartment in a similar condition.

Officer Emmert received information from Mrs. Hart and her two sons that Gelvin, whom Mrs. Hart knew, had come to the apartment uninvited, was acting strangely, claimed to be "on acid" and had waived a small piece of paper in the air, claiming it was LSD. Further, the officer was informed that the piece of paper had been placed in Gelvin's wallet. Officer Emmert was also informed that Gelvin had assaulted Mrs. Hart and torn her telephone off the wall.

Believing under the total circumstances of the situation that he did not have sufficient grounds to make an arrest on any charge, Officer Emmert took Gelvin into custody and transported him to the Burleigh County, North Dakota, jail

for the purpose of non-criminal detoxification. At no time prior to taking Gelvin to the jail did he place Gelvin under arrest.

At the jail, Gelvin's belongings were taken from him and a jailhouse inventory search was conducted. During that search, Officer Emmert thoroughly examined Gelvin's wallet, and in it found a small piece of paper with a design of the cartoon character "Goofy". This piece of paper was seized by Officer Emmert, and subsequent chemical testing of it showed that it contained LSD.

On April 27, 1981, Gelvin was charged with possession of a controlled substance, namely Lysergic Acid Diethylamide (LSD), a Class C Felony under the laws of the State of North Dakota. A preliminary hearing was held on May 19, 1981, and Gelvin was bound over to District Court. Gelvin was arraigned and an Information filed on June 1, 1981.

On June 22, 1981, Gelvin filed with the District Court a Motion to Suppress the alleged LSD, on the grounds that the search of Gelvin's wallet and the seizure of the piece of paper was unlawful pursuant to the provisions of the Fourth Amendment of the United States Constitution. On August 11, 1981, the Honorable Gerald G. Glaser, Judge of the District Court, granted Gelvin's motion and suppressed as evidence the alleged LSD. A copy of the Memorandum Opinion and Order granting Gelvin's Motion to Suppress appears in the attached Appendix at pages A1 to A7.

On August 17, 1981, the State of North Dakota filed with the District Court a Notice of Appeal, appealing the Memorandum Opinion and Order of Suppression to the Supreme Court of the State of North Dakota. On April 21, 1982, following briefs and oral argument, the North Dakota Supreme Court entered judgment reversing the Order of Suppression of the trial court. One of the primary issues

argued before the North Dakota Supreme Court was whether or not the search of Gelvin's wallet and the seizure of the paper therein constituted an unreasonable search and seizure pursuant to the terms of the Fourth Amendment to the United States Constitution.

On April 29, 1982, Gelvin timely petitioned the North Dakota Supreme Court for a rehearing, again raising the issue of the reasonableness of the search and seizure in this case. On April 29, 1982, said Petition for Rehearing was denied. A copy of said denial appears at Appendix page A20.

On May 5, 1982, Gelvin was granted an extension of Stay of Mandate for a period of 30 days, for the purpose of petitioning the United States Supreme Court for a Writ of Certiorari.

Gelvin now petitions the Supreme Court of the United States of America for a Writ of Certiorari to the Supreme Court of the State of North Dakota, reviewing the Judgment of Reversal entered by the Supreme Court of the State of North Dakota on April 21, 1982.

REASONS FOR GRANTING WRIT

I. CONSIDERABLE CONFLICT AND CONFUSION EXISTS BETWEEN THE STATES AND THE FEDERAL CIRCUITS AS TO THE NATURE AND SCOPE OF THE JAILHOUSE INVENTORY SEARCH EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT.

The specific facts of this case involve the search of a detainee's wallet at a jail pursuant to the so-called "inventory search" exception to the warrant requirement of the Fourth Amendment. The United States Supreme Court has approved the concept of this exception in the often-quoted case

of South Dakota v Opperman, 428 U.S. 364, (1976). Opperman clearly dilineated the rationale for the inventory search exception. It is as follows, 428 U.S. 364, 369:

1. Protection of the detainee's property while it remains in police custody.
2. Protection of the police against claims and disputes over lost and stolen property.
3. Protection of the police from danger.

The rationale for the inventory search is far different from the rationale for the so-called "search incident to arrest" exception to the warrant requirement, which is at least partly investigatory in nature, while the inventory search supposedly is not. See South Dakota v Opperman, supra, and Kaufman v United States, 453 F.2d 798 (8th Cir. 1971). However, as will be seen, it is submitted that there is conflict between the states, and the Federal Circuits, as to the scope of such an inventory search, and also confusion among the States, and the Federal Circuits, as to whether a given search is, in fact, an inventory search or a search incident to an arrest.

It should be noted at the outset that, in this case, Gelvin was brought to the Burleigh County Jail for the purpose of detoxification. Under North Dakota law, when a person is detained for such detoxification he is not under arrest. Indeed, as the North Dakota Supreme Court states in its opinion in this case, at Appendix page A11:

> Initially, we note that Gelvin was brought to the Burleigh County Jail for detoxification; he had not been placed under arrest at the time his possessions were inventoried at the jail. Therefore, the search in this case cannot be justified as a search incident to an arrest.

Therefore, in this case we are faced with the somewhat extraordinary situation of a "pure" inventory search, and one which is not tainted with elements of a search incident to an arrest, since there was no arrest.

It is submitted that conflict exists between the various states as to the scope of a search conducted pursuant to the inventory search exception to the warrant requirement. For example, the State of Michigan is very liberal as to the scope of such a search. See People v Walker, 228 NW 2d 443 (Mich. 1975); and People v Brooks, 274 NW 2d 430 (Mich. 1979).

This liberal scope of search also appears to be the rule in the State of Indiana. See Dearing v State, 393 NE 2d 167 (Ind. 1979).

Although neither state has ruled specifically on the question of a search of a wallet, it would appear that should such a situation arise before these courts, the search would be allowed.

On the other hand, a number of states are very restrictive in the scope of the search allowed under the inventory search exception. Foremost among these is the State of Alaska. See Reeves v State, 599 P.2d 727 (Alk. 1979); and Lyle v State, 600 P.2d 1357 (Alk. 1979.)

The State of Illinois is also very restrictive in the scope of such a search. See People v Redmond, 390 NE 2d 1364 (Ill. 1st Dist. 1979); and People v Bayles, 411 NE 2d 1346 (Ill. 1980).

The State of North Carolina is also very restrictive in the scope of its inventory searches. See State v Hall, 279 SE 2d 111 (N.C. App. 1981).

The State of Hawaii is also particularly restrictive in the scope allowed in inventory searches. See State v Kaluna,

520 P.2d 51 (Hawaii 1974).

These states have also not had occassion to deal with a wallet as the particular container involved in an inventory search. However, it is submitted that, given the reasoning in these cases, a search of a wallet, such as in the present case, would not be allowed.

Further, a number of states appear completely confused as to whether or not a given search is, in fact, justified under the inventory search exception or under the search incident to arrest exception. The Supreme Courts of these states will begin discussing a given search in terms of an inventory search, and end up justifying it on the basis of a search incident to an arrest. The State of Minnesota is such an example. See State v Scroggins 210 NW 2d 55 (Minn. 1973).

The State of Wisconsin has similarily confused the two exceptions to the warrant requirement. See State v Mabra, 213 NW 2d 545 (Wis. 1974); and State v Mordeszewski 229 NW 2d 642 (Wis. 1975).

The Supreme Court of North Dakota, while ruling in this case on a search conducted strictly under the inventory search exception, in its opinion in this case, attached in the Appendix hereto, justifies its reasoning by citing a number of cases, almost all of which were not decided on the basis of an inventory search, but which were decided on the basis of a search incident to arrest, or on grounds other than a strict inventory search. See Appendix page A13.

A similar situation would appear to exist within the Federal Circuits. For example, the Eighth Circuit in the case of United States v Bloomfield, 594 F.2d 1200 (8th Cir. 1979), held that an inventory search can be applied to any container not securely closed. As the Court states, at 594 F.2d 1200, 1203:

> In conclusion, we note that our holding that the knapsack should have been inventoried as a unit rather than opened and itemized is confined to the facts before us. If a container which is to be inventoried is not securely closed so that the articles within could possibly fall out, it may be wiser for police to itemize the articles. See United States v Newman, 585 F.2d 355 (8th Cir. 1978).

On the other hand, the Ninth Circuit, in the recent case of United States v Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981), held that a purse could not be searched during the course of a routine inventory search. As the court states at 662 F.2d 1285, 1290:

> Although we recognize that there is a fine line between the wallet on the person and a purse within the arrestee's control, we hold that possessions within an arrestee's immediate control have Fourth Amendment protection at the station house, unless the possession can be characterized as an element of the clothing or another exception to the Fourth Amendment requirement applies.

It is therefore submitted that an obvious conflict exists between at least the Eighth and Ninth Circuits as to the scope of an inventory search for an item such as a purse, in that the Ninth Circuit specifically prohibited it, while the Eight Circuit would presumably allow it.

It is also interesting to note that the Ninth Circuit in United States v Monclavo-Cruz, supra, tacitly authorized the search of a wallet. However, this dicta allowing the search of a wallet in United States v Monclavo-Cruz, supra, which dealt exclusively in terms of an inventory search, was based entirely upon a prior Ninth Circuit case, United States v Passano, 624 F.2d 938 (9th Cir. 1980), which dealt exclusively in terms of a search incident to an arrest. It

would thus appear that the Ninth Circuit, like the States of Minnesota and Wisconsin, has trouble differentiating between an inventory search and a search incident to an arrest.

In sum, it is submitted that considerable confusion exists, both in the states and the Federal Circuits, as to not only the scope of the inventory search exception to the warrent requirement, but to whether or not a given search is, in fact, a search incident to an arrest or an inventory search. It is further submitted that the present case offers the United States Supreme Court an excellent opportunity to resolve this confusion and conflict, especially in view of the fact that an item such as a wallet is the container at issue here, and the fact that this case presents a situation of a "pure" inventory search without the possibly-confusing element of a search incident to an arrest.

II. THE INVENTORY SEARCH OF GELVIN'S WALLET AND THE SEIZURE OF THE ALLEGED CONTROLLED SUBSTANCE THEREIN, WAS AN UNREASONABLE SEARCH AND SEIZURE PURSUANT TO THE PROVISIONS OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The principle of the inventory search was first set forth by the United States Supreme Court in the case of South Dakota v Opperman, supra. As has been discussed, the grounds for such an inventory search are three-fold:

1. Protection of the detainee's property while it remains in police custody.

2. Protection of the police against claims and disputes over loss and stolen property.

3. Protection of the police from danger.

It is undisputed that jailers must have such a device in order to effectively run jails. However, the scope of such a search remains in very large dispute.

In the opinion of the undersigned, the most well-reasoned discussion of both the justification and rationale for the inventory search, and its scope, can be found in the case of Reeves v State 599 P.2d 727 (Alk. 1979). As the Reeves court states, at 599 P.2d 727, 735:

> There are two valid justifications for allowing a pre-incarceration inventory search exception to the warrant requirement. The first is the institutional interest in prohibiting the introduction of weapons, illegal drugs, and other contraband or potentially dangerous items into the jail environment. The second is the protection of the arrestee's property and the related interest of the jail administration in protecting itself against claims of loss or damage to that property occurred while the property was under the control of jail authorities . . . To this end, [jail authorities] may require internees to surrender any possible repositories for such items prior to incarceration. However, a concomitant of this wide authority to prohibit the entry of personal belongings which may harbor forbidden contents is a complete absence of authority to conduct a general exploratory search of the belongings themselves. This absence of authority derives from the lack of any justification for such a further search inherent in the exception itself. Once the internee has turned over his possessions for safekeeping it is no longer possible that he may take them into jail. Thus, correctional officers may conduct a reasonable search of an arrestee's person for this reason, but may not further search the arrestee's possessions discovered and removed in that search in the absence of a warrant or circumstances which

provide the basis for a more intensive search under another recognized exception to the warrant requirement.

Concerning the second related justification, that of the protection of the arrestee's property and guarding against false claims, the Reeves court reasoned as follows, at 599 P.2d 727, 735-737:

> The State can also be fairly and reasonably protected from claims of loss or damage to an arrestee's property in its possession without an intensive exploratory pre-incarceration search. As we noted in our recent opinion in State v Daniel, 589 P.2d 408, 415 (Alk. 1979) the State, as an involuntary bailee, has "only a 'slight' duty of care" with respect to property in its possession because of the arrest of the property owner and this "duty could easily be met without extensive inventory". The State can effectively insulate itself against fraudulent claims by simply listing by description any items of property taken from an arrestee; securing these items in a property bag or other secure storage container used in the facility, preferably in the arrestee's presence; and obtaining the arrestee's signature acknowledging the correctness of the inventory so taken. If there is any question as to the contents of any container, the arrestee should be "consulted and offered the opportunity to request that an inventory be made of the contents" of such containers. We think the above procedure and limited search fairly and reasonably protects the State against fraudulent claims
>
> . . .

It is submitted that the above reasoning is extremely clear and succinct, and applies directly the case at bar. Gelvin's wallet had already been seized by the jail authorities, and

therefore could not cause any trouble in the jail. Further, the jail, as a "involuntary bailee" had only a slight duty of care concerning the wallet, and could very easily have protected itself against spurious claims by taping the wallet shut and putting it in a locker. No exigent circumstances existed for the searching of the wallet, and if the State had wished to search it a warrant could easily have been obtained.

As has been discussed, South Dakota v Opperman, supra, established the principle of a justification for the inventory search of an automobile. However, subsequent United States Supreme Court decisions greatly refined the scope of any such inventory search.

In United States vs Chadwick, 433 U.S. 1 (1977), a sharp distinction was drawn between the inventory search of an automobile, as allowed in South Dakota vs Operman, supra, and a footlocker taken from an automobile. Chadwick drew this distinction using basically the same reasoning as appears quoted above from State v Reeves, supra.

In Arkansas v Sanders, 442 U.S. 753 (1979), the United States Supreme Court drew an even a sharper distinction, holding that the prohibition against searching footlockers removed from automobiles extended to all luggage taken from automobiles.

The main consideration in deciding whether or not a certain container can be searched depends on whether or not an individual has an expectation of privacy for the contents of the container. The United States Supreme Court has determined that an expectation of privacy does exist for the contents of a footlocker, and of luggage. See United States v Chadwick, supra, and Arkansas v Sanders, supra. One primary question in this case is whether an expectation of privacy exists for the contents of a wallet.

In United States v Monclavo-Cruz, supra, the Eighth Circuit had occasion to discuss whether or not an expectation of privacy exists with relation to a purse, 662 F.2d 1285, 1287:

> . . . it is beyond doubt that society recognizes that an expectation of privacy in purses is reasonable.

It is submitted that an expectation of privacy no less exists with a wallet than a purse, and that, in fact, a greater expectation of privacy exists with relation to a wallet than with luggage.

To the best knowledge of the undersigned, the United States Supreme Court has never decided whether or not an expectation of privacy exists as to the contents of a wallet, and whether or not a jailhouse inventory search can be extended to searching the contents of a wallet.

However, it is submitted that with its decisions in United States v Chadwick, supra, and Arkansas v Sanders, supra, the United States Supreme Court is developing an evolving body of law concerning inventory searches which exactly coincides with the arguments put forth by Gelvin in this case. It is therefore requested that the United States Supreme Court undertake review of this case, and extend the prohibition as set forth in United States v Chadwick, supra, from the luggage therein to the wallet in the present case, as being an unreasonable search and seizure pursuant to the Fourth Amendment to the Constitution of the United States.

CONCLUSION

It is submitted that considerable confusion exists among the various state courts as to the scope of jailhouse inventory searches, with some states having a very limited scope of search, some states having a very liberal scope of search, and some states being very confused as to whether a given search is an inventory search or a search incident to arrest. The same type of conflict and confusion would also appear to exist in at least two of the Federal Circuits. It is further submitted that this conflict and confusion is widespread to the point where only a decision by the United States Supreme Court will serve to provide definite direction in the matter.

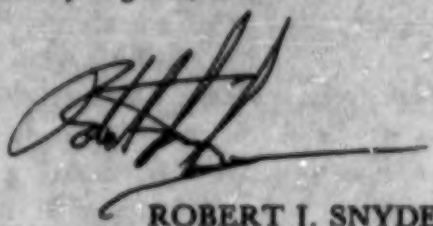
It is further submitted that, given the rationale for the inventory search exception to the warrant requirement, an inventory search should not extend to the contents of a container such as a wallet, and that the better-reasoned decisions so limit the search. Further, it is submitted that the United States Supreme Court, with its decisions in United States v Chadwick, supra, and Arkansas v Sanders, supra, is developing a body of law concerning inventory searches which prohibits searching articles carrying with them an expectation of privacy unless a warrant is first obtained, or exigent circumstances are present.

Finally, it is submitted that this is the proper case in which to settle the matter of the scope of inventory searches of articles taken from the person of a detainee, in that this case involves the rather extraordinary situation of a person searched at a jail who was not brought there under arrest, therefore removing the possibly-confusing element of a search incident to an arrest.

For the reasons stated above and the cases cited within the

body of this Petition and in the Conclusion, the Petitioner respectfully prays that a Writ of Certiorari be granted.

Dated this 2nd day of June, 1982.



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APPENDIX A

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 81-05-082
	)	
Ralph H. Glevin,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

The defendant has moved to suppress evidence obtained from his wallet. The State resists. The evidence was seized without a warrant, and the State accordingly acknowleges that the burden rests with it to establish that the search and seizure was justified on the basis of a recognized exception to the warrant requirement.

The prosecution states that the facts are as set forth in the defendant's brief in support of his motion and as supplmented by testimony at the suppression hearing.

It appears that during the early evening hours of Apr. 2, 1981, a police officer received a telephone call regarding an incident at an apartment dwelling in Bismarck. When the officer entered the apartment, he noticed the tenant of the apartment (Mrs. Hart) lying on the floor in an apparent semiconscious condition. He also noticed the defendant lying on the floor of the kitchen in a similar condition. The officer was informed that Mr. Gelvin, who is known by Mrs.

Hart, had entered her apartment uninvited and had exhibited bizarre behavior, and refused to leave, and had in general acted "weird." She further informed the officer that Mr. Gelvin had made some statement to the effect that he was under the influence of "acid" and had waved something in the air which he claimed was LSD, which the officer was told was in his wallet. He was also told that Mr. Gelvin had assaulted her and had pulled the telephone off the wall.

The officer neither arrested nor searched Mr. Gelvin at the scene but did take him into custody and transported him to the Burleigh County Jail for purposes of detoxification. Intoxication is not an offense in this state, but officers are authorized to take intoxicated persons into custody for their own protection.

At the jail the defendant's belongings were taken from him, and an inventory was made. During the inventory process the officer opened the defendant's double-fold wallet and saw a piece of paper lying loosely therein with a picture of the cartoon character "Goofy" printed thereon. The officer testified that he had learned from his experience and training that this is a common method of carrying LSD. The paper was taken from the wallet, analyzed, and found to contain LSD.

The purpose of taking inventory is three fold: (1) to take from the incarcerated person anything with which he might harm himself or others or attempt to escape; (2) to prevent the introduction of contraband into the jail; and (3) to protect the officers incarcerating the defendant against claims of theft or other misuse of the defendant's property. Standard practice in conducting the inventory at the Burleigh County Jail includes not only removing the objects from the defendant for safekeeping but inventorying the contents of any

closed objects, such as a wallet. In the case of a wallet, in other words, the pockets are all examined, the money counted, etc. The police officer did testify that part of his motivation in examining the interior of the wallet was to look for the paper, but, in view of the general practise, that fact is irrelevant in determining whether the examination was justified.

While the officer was at the apartment, he had accumulated sufficient information to justify him in concluding that probable cause existed for believing the defendant was in possession of LSD, which is a felony; therefore, it exigent circumstances existed, he would have had the right to search the defendant for the substance. The fact that he chose to take the defendant into custody and defer such a search would not alter that proposition. There is a dictum in the case of State v Gagnon, 207 N.W.2d 260 (N.D. 1973), which can be read to mean that if exigent circumstances do not exist at the time the search occurs, a warrant is necessary.

Subsequent developing case law, however, clearly establishes that this is not the law. The law is that if there exists the right to search without a warrant due to exigent circumstances, the right to search does not cease simply because the officer chooses to defer that process until a time when the exigency has passed. See Bailey v. State, 294 A.2d 123, 134-37 (Md. App. 1972), which contains an excellent discussion of this subject. See also: King and Mobley v. State, 298 A.2d 446 (Md. App. 1973); State v. Meadows, 260 N.W.2d 308 (N.D. 1977); State v. Binns, 194 N.W.2d 756 (N.D. 1972).

State v. Gagnon, supra, held that evidence was properly suppressed because there was neither probable cause for arrest nor probable cause for seizing the vehicle. The discus-

sion regarding the fact that exigency no longer existed at the time of the search was a dictum.

> Gratuitous remarks should not be made in opinions by this court. They are dicta, and when they creep in, deserve to be ignored.
>
> Boedecker v. St. Alexius Hospital, 298 N.W.2d 372 (N.D. 1980).

I heed this admonition.

The question present is whether at the time probable cause developed there were exigent circumstances which would have justified an immediate warrantless search of the defendant for the LSD.

Normally, whether we are talking about a movable automobile or a movable person, exigent circumstances exist, because the car or the defendant will be gone or will have had the opportunity to destroy the evidence before a warrant can be obtained. The present situation, however, is unusual. The record is not clear as to the exact condition of the defendant, nor is it clear how he was taken to the jail. He was apparently semiconscious, and, since he was acting irrationally, it may well be that the officer handcuffed him. I do not know this. The record does not disclose the particular circumstances.

An important element in considering this matter is the conduct of the officer himself. Once can infer that he did not believe exigent circumstances existed necessitating the immediate search, as he made no effort to search. The defendant was under the control of the officer, and it may well be that the situation was such that the defendant had no opportunity to destroy the evidence. As noted, I do not know this, but neither do I know that the defendant was in a position to destroy the evidence. The burden rests with the State to

establish that such a circumstance necessitated an immediate search, and the State has not established that. Perhaps it could have done so; nevertheless, it has not. I conclude that the record does not permit a finding that exigent circumstances existed which justified a warrantless search, even though probable cause existed to make such a search.

With respect to the inventory, courts have generally recognized that removing the defendant's possessions from him and inventorying them when he is taken into custody are a legitimate practice. The case law is still developing, however, on the precise scope of this process. In this case, for example, the defendant concedes that removing the wallet for safekeeping was legitimate but argues that opening it and examining its contents was not.

There are competing interests here. The interests of the State have already been noted, against which we are balancing the defendant's right of privacy. The conflicting interests should be harmonized, insofar as possible, which is to say that the right of the State to intrude upon the defendant's right of privacy should extend no further than is necessary to protect the State's interests. In this connection, I agree basically with the approach taken by the Alaska Supreme Court in Reeves v. State, 599 P.2d 727 (Al. 1979), wherein the Court states:

> The search of an arrestee's person should be no more extensive than reasonably necessary to prevent the entry of weapons, illegal drugs, and other contraband or potentially dangerous items into the jail. Any items taken from the arrestee's possession in this search may not be further searched except pursuant to a search warrant or another recognized exception to the warrant requirement applicable in the circumstances. Finally, the inventory conducted shall consist of cataloging of

> the arrestee's property thus seized and may not, without a specific request from the arrestee, extend to a search and inventory of the contents of any object, closed or sealed container, luggage, briefcase, or package . . . . [emphasis added]

Reeves v. State, supra, at 737.

Although I agree fundamentally with the foregoing stated proposition, I think it is in some respects too broad. For example, circumstances may exist whereby the police have articulated reasons for suspecting a closed object may contain a bomb or a loaded weapon. In such a situation, the police may open the object if this is necessary to determine whether such is the case. This would be permissible even though the sealed object had not been taken with the arrestee into custody, because the necessity for protection of persons within the jail exists regardless of where the object is kept.

The refinement just mentioned, however, does not apply in the instant case, because, even though the officer did have an articulated reason for believing the wallet contained contraband and may indeed have had probable cause for such a belief, the wallet, along with the suspected contraband it contained, was being removed from the defendant and placed in safekeeping. There is no showing that the question of the existence of probable cause could not have been submitted to a neutral magistrate during the period the defendant and his wallet were being held in custody.

The Alaska opinion does not address the situation in which the person, because of intoxication or other mental incapacity, is unable to make a specific request. In such circumstances, however, the officers are subject to later claim regardless of the extent of the inventory, since the person incarcerated will be in a position to claim he hadn't known what he was signing. Hence, there is no purpose for a

particularized inventory. There is also the possibility that someone, other than the booking officer, could later abscond with the person's possessions, and a complete inventory would at least protect the intake officer from this kind of event. Again, however, needs must be balanced. The possibility is not justification to invade the privacy of a detainee for the purpose of protecting an officer against the possible impropriety of a fellow officer.

In this case the officer also testified that he was also looking for identification when he opened the wallet. The necessity of obtaining identification may well constitute an articulated reason for opening a wallet.

The problem in this case is that the record does not establish the need to search in order to obtain identification. The detainee had already been identified by others, and, if something more were needed, there is no showing it could not have been obtained from the detainee. There could have been a request to see his driver's license, just as in the case of an officer stopping a traffic code violator. In the latter situation, there is a need for identification, but the officer does not rummage through the detainee's wallet. He requests and obtains identification from the detainee, partly, it might be added, for the purpose of avoiding a claim of theft.

I conclude that the prosecution in this case has failed to demonstrate a need for searching the defendant's wallet or making an inventory of its contents.

The motion to suppress evidence is, therefore, granted.

Signed at Bismarck, North Dakota, August 11, 1981.

BY THE COURT:

Gerald G. Glaser, District Judge

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The State of North Dakota,

Plaintiff and Appellant

v.

Ralph H. Gelvin, Defendant and Appellee

Criminal No. 793

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Gerald G. Glaser, Judge.

REVERSED.

Opinion of the Court by Paulson, Justice.

Gail Hagerty, Assistant State's Attorney, Courthouse, Box 1901, Bismarck, for plaintiff and appellant.

Robert J. Snyder, P.O. Box 2071, Bismarck, for defendant and appellee.

PAULSON, Justice.

The State appeals from a memorandum opinion of the District Court of Burleigh County dated August 11, 1981, which suppressed certain evidence.[1] We reverse.

During the early evening hours of April 2, 1981, Officer Cliff Emmert of the Bismarck Police Department was dispatched to investigate an incident at the apartment of Mrs. Shirley Hart in south Bismarck. Upon arriving at the

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[1]We note that the State has appealed from the district court's memorandum opinion. Although the parties to this action did not raise the issue of the appealability of a memorandum opinion, it is the duty of this court to dismiss the appeal on our own motion if we conclude that it is not appealable. Chas. F. Ellis Agency, Inc. v. Berg, 214 N.W.2d 507, 509 (N.D. 1974).

We have previously held in civil cases that a memorandum decision is generally not appealable. Chas. F. Ellis Agency, Inc. v. Berg, supra 214 N.W.2d at 510; Nord v. Koppang, 131 N.W.2d 617, 618 (N.D. 1964); Karabensh v. Grant, 73 N.W.2d 782, 783 (N.D. 1955). However, when the memorandum opinion contains an order which was intended to be a final order and the order is one from which an appeal may be taken pursuant to statute, we will treat the appeal as an appeal from the order. Bond v. Busch, 313 N.W.2d 704, 705 n.2 (N.D. 1981); Hospital Services, Inc. v. Dumas, 297 N.W.2d 320, 320-321 n.1 (N.D. 1980).

We believe the same standard should apply in criminal cases. We stated in State v. Jelliff, 251 N.W.2d 1, 4 (N.D. 1977), that "statutes conferring the right to appeal must be liberally construed, and that in determining appealability it is not the label which controls but, rather, the effect". Although in the instant case the district court issued a memorandum opinion granting the defendant's motion to supress evidence, it is clear from the circumstances that the court intended the memorandum opinion to have the effect of a final order. Under these circumstances, we will treat the appeal as an appeal from the order contained in the memorandum opinion.

apartment, Officer Emmert found Mrs. Hart on the floor in the hallway of her apartment in a semiconscious condition. He also observed the defendant, Ralph H. Gelvin, lying unconscious on the floor in the kitchen of the apartment. Mrs Hart told Officer Emmert that Gelvin had come to her apartment uninvited and had been acting very strangely. Mrs. Hart further stated that Gelvin claimed to be on drugs and had waved in the air a small piece of paper, claiming that it was LSD [lysergic acid diethylamide]. Gelvin had refused to leave and Mrs. Hart attempted to telephone the police, but Gelvin assaulted her and tore her telephone off the wall.

Officer Emmert took Gelvin into custody and transported him to the Burleigh County Jail for detoxification. At the jail, Gelvin's belongings were taken from him and an inventory conducted. During this inventory of Gelvin's belongings, Officer Emmert opened Gelvin's wallet. Lying loose between the folds of the wallet was a small piece of paper with a cartoon design on it. Officer Emmert, believing the paper to be "blotter acid", LSD, sealed it in an envelope and placed it in an evidence locker. Subsequent testing at the Crime Laboratory Division of the State Laboratories Department indicated that the paper did indeed contain LSD.

On April 27, 1981, Gelvin was charged with possession of a controlled substance. Gelvin filed a motion to suppress the evidence of LSD which was discovered during the inventory of his belongings at the Burleigh County Jail, and the district court granted Gelvin's motion to suppress in a memorandum opinion dated August 11, 1981.

The sole issue raised on this appeal is whether or not the district court erred in suppressing evidence seized from the defendant's wallet during an inventory conducted when the

defendant was taken into custody for detoxification.

Initially, we note that Gelvin was brought to the Burleigh County Jail for detoxification; he had not been placed under arrest at the time his possessions were inventoried at the jail. Therefore, the search in this case cannot be justified as a search incident to an arrest.

The State contends that the examination of the contents of Gelvin's wallet was a routine inventory search conducted pursuant to standard jail procedure. In South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the United States Supreme Court upheld a routine inventory search of an impounded automobile. Various other courts have extended the rationale of Opperman to routine inventory searches of the articles possessed by a person lawfully taken into custody. See, e.g., United States v. Bloomfield, 594 F.2d 1200, 1201-1202 (8th Cir. 1979); Sumlin v. State, 266 Ark. 709, 587 S.W.2d 571, 577 (1979); Dearing v. State, 393 N.E.2d 167, 171 (Ind. 1979). As noted by the Supreme Court of Indiana in Dearing v. State, supra 393 N.E.2d at 171:

> "Our analysis of this issue begins with the case of South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000. The issue there before the United States Supreme Court was the propriety of an inventory of an automobile; however, an examination of Justice Burger's majority opinion reveals general guidelines to determine the constitutionality of any

type of inventory. The Court, in finding a distinction between searches pursuant to criminal investigations and 'noncriminal' inventories, noted that the making of inventories is not governed by the 'probable cause' concept, nor is a warrant required. Rather, the test of the consitutionality of an inventory is whether, under all the circumstances, the intrusion was reasonable."

Three interests have been advanced in support of inventory searches: (1) protection of the detainee's property while it remains in police custody; (2) protection of the police against claims and disputes over lost or stolen property; (3) protection of the police from danger. South Dakota v. Opperman, supra 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed.2d at . Although courts have generally recognized that those interests require that a detainee's possessions be removed from him and inventoried when he is taken into custody, these courts have expressed widely divergent views regarding the proper scope of the inventory process. Cases involving the inventorying of the contents of closed containers have proved especially difficult.

Some courts faced with this issue have held that a closed or locked container should be inventoried as a unit without searching its contents, while other courts have held that the contents of closed or locked containers must be inventoried to protect the three interests delineated above. Courts have generally employed a balancing test, weighing the detainee's right to privacy in the contents of the container against the State's interest in protecting the three interests listed above: protection of the detainee's property, protection of officers from frivolous claims, and protection of officers from danger.

We note that most of the "closed container inventory search" cases have involved luggage, briefcases, and

purses[2]. Although we express no opinion as to the propriety of conducting inventory searches of closed or locked containers in general, we hold that it was proper for the officers in this case to inventory the contents of Gelvin's wallet.

We have discovered numerous cases in which courts have held that it is permissible to inventory the contents of a detainee's wallet when done pursuant to established police procedures. United States v. Mathews, 615 F.2d 1279, 1286 (10th Cir. 1980); United States v. Gallop, 606 F.2d 836, 839 (9th Cir. 1979); United States v. Jenkins, 496 F.2d 57, 73 (2d Cir. 1974), cert. denied, 420 U.S. 925, 95 S.Ct. 1119, 43 L.Ed.2d 394 (1975); United States v. Gardner, 480 F.2d 929, 931 (10th Cir.), cert. denied, 414 U.S. 977, 94 S.Ct. 297, 38 L.Ed.2d 220 (1973); State v. Mordeszewski, 68 Wis.2d 649, 229 N.W.2d 642, 647-649 (1975). Gelvin has failed to cite any case which holds that an inventory of the contents of a detainee's wallet is

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[2]See, e.g., United States v. Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981) [purse]; United States v. Bloomfield, 594 F.2d 1200 (8th Cir. 1979) [knapsack]; United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978) [locked briefcase]; Sumlin v. State, 266 Ark. 709, 587 S.W.2d 571 (1979) [purse]; Parris v. State, 270 Ark. 269, 604 S.W.2d 582 (Ct.App. 1980) [purse]; Delatte v. State, 384 So.2d 245 (Fla.App. 1980) [travel bag]; Dearing v. State, 393 N.E.2d 167 (Ind. 1979) [suitcase]; Bradford v. State, 401 N.E.2d 77 (Ind.App. 1980) [purse]; People v. Miller, 312 N.W.2d 225 (Mich. App. 1981) [briefcase]; People v. Merchant, 86 Mich.App. 355, 272 N.W.2d 656 (1978) [briefcase]; State v. Prober, 98 Wis.2d 245, 297 N.W. 2d 1 (1980 [purse]; State v. McDougal, 68 Wis.2d 399, 228 N.W.2d 671 (1975) [locked suitcases].

constitutionally impermissible.[3]

Gelvin argues that the State's interests could have been served equally well in this case if his wallet had merely been taped shut, without inventorying its contents, and listed on the inventory as "one wallet and contents". We do not agree. In order to fully protect the State's interest in shielding its officers from frivolous claims or disputes over lost or stolen property, and to fully protect the detainee's property while it remains in police custody, it was necessary

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[3]We note that the case most heavily relied upon by Gelvin in his brief, and the only case cited by the district court to support its conclusion on this issue, is Reeves v. State, 599 P.2d 727 (Alaska 1979), a case involving a search of the contents of a balloon found on the defendant's person when he was being booked into jail. A careful reading of Reeves, supra, however, reveals that the case was decided entirely upon state constitutional grounds. The court specifically noted that "It is not at all certain that the fourth amendment to the United States Constitution, as presently construed, places any significant limitations on the scope of an inventory search conducted pursuant to a custodial arrest". Id. at 734. The court went on to note that it was therefore considering the scope of the inventory within the framework of its broader state constitutional guarantees, in Reeves, supra 599 P.2d at 734-735:

> "As we have frequently noted, the Alaska constitutional guarantee against unreasonable searches and seizures is broader in scope than fourth amendment guarantees under the United States Constitution, at least in part because of the more extensive right of privacy guaranteed Alaskan citizens by article I, section 22 of our state constitution. Thus, it is within the framework of Alaska's constitutional guarantees that we must analyze and delineate the permissible scope of pre-incarceration inventory searches in order to determine the validity of the search of Reeves' person undertaken at the Anchorage jail following his arrest."

Article I, section 22 of the Constitution of Alaska provides:

> "Section 22. Right of Privacy. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

to inventory the contents of the wallet. As noted by the Court of Appeals of Michigan in People v. Walker, 58 Mich.App. 519, 228 N.W.2d 443, 446 (1975): "It would be naive and pointless to assume that law enforcement officials may store an arrestee's personal effects without first determining what it is they are inventorying." We also agree with the language of Justice Hansen of the Supreme Court of Wisconsin in his dissent in State v. McDougal, 68 Wis.2d 399, 228 N.W.2d 671, 679 (1975):

> "For the court-specified purpose of protecting against future claims of impounded property being missing, such inventorying goes to contents, as well as container. To list, '1 purse' or '1 pocketbook' would provide no protection at all to the police against a claim that $100 or $1,000 was later missing from purse or pocketbook."

We also note that the United States Court of Appeals for the Eighth Circuit, which had previously held that it was impermissible to inventory the contents of a locked briefcase in United States v. Schleis, 582 F.2d 1166, 1172-1173 (8th Cir. 1978), has since somewhat limited its holding in that case. In United States v. Bloomfield, 594 F.2d 1200, 1203 (8th Cir. 1979), the court held that an inventory of the defendant's knapsack was impermissible, but indicated that its holding did not apply to situations where the container was not "securely closed":

> "In conclusion, we note that our holding that knapsack should have been inventoried as a unit rather than opened and itemized is confined to the facts before us. If a container which is to be inventoried is not securely closed so that the articles within could possible fall out, it may be wiser for police to itemize the articles. See United States v. Neumann, 585 F.2d 355 (8th Cir.

1978). And, if police have some reason to believe a container which is to be inventoried holds instrumentalities which could be dangerous even when sitting idly in the police locker, the police may, and should, inventory the contents of the container."

A wallet is a container which generally is not securely closed, so that articles within could possible fall out; therefore, it is wiser for police to itemize the contents of a wallet when conducting a routine inventory search.

We further conclude that a different result is not required merely because Gelvin was taken into custody for detoxification and had not been arrested at the time his possessions were inventoried. Inventory searches have been upheld, not because of their relationship to an arrest, but because of their relationship to legitimate jail custodial purposes. As noted by the United States Court of Appeals for the Ninth Circuit in United States v. Gallop, supra 606 F.2d at 839:

> "The next question in the case at bar, and one not without difficulty, is whether the reason for the officers' taking Connors into custody should alter this federal constitutional analysis. Wash.Rev.CodeAnn. §70.96A.120 (2) specifies that persons taken into protecuve custody thereunder are not arrested, and are not charged with crime. We find no substantial basis for holding that the reasons for a police inventory which were outlined in South Dakota v. Opperman, supra, do not apply to property taken under police protection when the owner of the property is 'detained' under police custody but not 'arrested'. Under Fourth Amendment standards, the inventory in this case was reasonable; the articles discovered thereby were not tainted with federal illegality.

We conclude that the policy considerations which justify

routine jailhouse inventory searches of arrestees are equally applicable when a person is brought into the jail for detoxification.

Gelvin also contends that the search in this case was not an inventory search at all, but, rather, was a "pretext" search conducted to discover evidence of a crime. Although Officer Emmert had a suspicion that Gelvin was in possession of drugs, this certainly did not mean that he could not inventory Gelvin's possessions prior to placing him in jail for detoxification. Gelvin does not argue that it was improper for Officer Emmert to bring him to the jail for detoxification. The evidence overwhelmingly indicates that Gelvin was extremely intoxicated, that he had been unconscious for a time, and that he had acted in a violent manner. Under these circumstances, Officer Emmert was certainly justified in concluding that Gelvin should be taken to jail for detoxification.

There is also ample evidence indicating that the inventory search of Gelvin's possessions was conducted pursuant to standard jailhouse procedures. Keene Just, a Burleigh County Deputy Sheriff assigned to the Burleigh County Jail, testified that it was standard procedure to inventory the possessions of person brought into the jail for detoxification, including the contents of wallets. We conclude that mere suspicion that contraband or evidence will be found will not invalidate an otherwise valid inventory search conducted pursuant to standard jailhouse procedure. United States v. Ducker, 491 F.2d 1190, 1192 (5th Cir.1974); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, 338, cert. denied, 444 U.S. 886, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979).

Finally, Gelvin contends that, even if the inventory search of his wallet were permissible, the seizure of the piece of paper and subsequent chemical testing was impermissible. The basis for Gelvin's argument is his contention that

an officer who discovers a small piece of paper with a picture of the cartoon character "Goofy" on it is not justified in believing that the paper contains a controlled substance. Gelvin specifically points to Officer Emmert's testimony that a chemical test was necessary to determine whether or not the paper actually contained a controlled substance.

We do not believe that it is necessary for an officer to be certain beyond a doubt that a substance is contraband before he may seize it and submit it for testing. The seizure of property by an officer who lawfully views it is permissible if there is "probable cause to associate the property with criminal activity". Payton v. New York, 445 U.S. 573, 587, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639, 651 (1980).

The facts in this case clearly establish that Officer Emmert had probable cause to believe that the paper found in Gelvin's wallet contained a controlled substance. Officer Emmert had previously been informed by Mrs. Hart that Gelvin had shown her a small piece of paper which Gelvin claimed contained LSD. Officer Emmert also testified that he had been shown similiar pieces of paper with the same design at a drug seminar, and had been informed that they contained "blotter acid", or LSD.[4] Under these

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[4]Officer Emmert testified, in relevant part, as follows:

"Q What did you do then with the small square of paper?

"A I sealed it up in an envelope and turned it in for evidence.

"Q Had you even seen anything similar to that piece of paper during the course of your training or experience as a law enforcement officer?

"A Yes, I have. In training, in a drug seminar, I was shown similar pieces of paper with the same design on it.

"Q What were you told those were?

"A That they were blotter acid — LSD."

circumstances, we believe that Officer Emmert had probable cause to believe that the piece of paper found in Gelvin's wallet contained a controlled substance. Officer Emmert was therefore justified in seizing the paper and submitting it for chemical testing.

The order of the District Court of Burleigh County suppressing evidence removed from Gelvin's wallet at the Burleigh County Jail is reversed.

April 29, 1982

Mr. Robert J. Snyder
BICKLE, COLES & SNYDER
Attorneys at Law
P.O. Box 2071
Bismarck, ND 58502

Re: State v. Gelvin
Cr. 793

Dear Mr. Snyder:

The Supreme Court has today entered an order denying the petition for rehearing in this case.

In accordance with Rule 41(a), NDRAppP, the mandate of the Supreme Court will be forwarded to the Clerk of the District Court after the expiration of seven days.

Sincerely yours,

Luella Dunn
Clerk of the Supreme Court

LD:cf
cc: Ms. Gail Hagerty, Assistant States Attorney

CERTIFICATE OF SERVICE

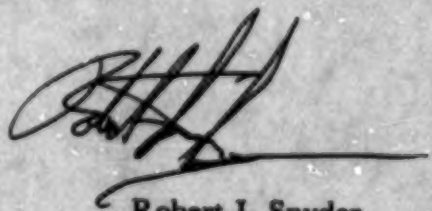
The foregoing Petition for a Writ of Certiorari and Appendix to the Petition for a Writ of Certiorari was served by mailing a true and correct copy thereof to:

(3 copies)
Gail Hagerty
Attorney at Law
P.O. Box 1901
Bismarck, North Dakota
58502

(1 copy)
Luella Dunn, Clerk
Supreme Court
State Capitol
Bismack, North Dakota
58505

(40 copies)
Alexander L. Stevas, Clerk
U.S. Supreme Court
Supreme Court Building
Washington, DC 20543

the same having been placed in the United States Mail with sufficient postage affixed, this 2nd day of June, 1982.



Robert J. Snyder

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No. 81-2254

In the Supreme Court of the United States

October Term, 1981

RALPH H. GELVIN

Petitioner,

vs.

STATE OF NORTH DAKOTA

Respondent.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

JOHN M. OLSON
Attorney for Respondent
Burleigh County Courthouse
P.O. Box 1901
Bismarck, North Dakota 58502
701-222-6672

TABLE OF CONTENTS

PAGE

Table of Cases ..... ii, iii

Statement of the Case 1

Reasons for Denying Writ: 2

I. There is not significant conflict or confusion between the states and the federal circuits as to the scope of the jailhouse inventory search expection to the Fourth Amendment warrant requirement 2

II. The inventory search of Gelvin's wallet and the seizure of the alleged controlled substance therein, was a reasonable search and seizure 6

Conclusion 9

TABLE OF CASES

PAGE

Arkansas v. Sanders
422 U.S. 753,
99 S. Ct. 2586,
61 L. Ed. 2d 235 (1979) 3, 5

People v. Bayles
411 N.E. 2d 1346 (Ill. 1980) 3, 4

People v. Redmond
390 N.E. 2d 1364 (Ill. 1st Dist. 1979) 3

People v. Walker
228 N.W. 2d 443 (Mich. 1975) 7, 8

Reeves v. State
599 P. 2d 727 (Alk. 1979) 2, 3

South Dakota v. Opperman
428 U.S. 364,
49 L. Ed. 1000,
96 S. Ct. 3092 (1964) 6

State v. Entsminger
160 N.W. 2d 480 (Iowa 1968) 6, 7

State v. Gelvin
318 N.W. 2d 302 (N.D. 1982) 2, 8

State v. Hall
279 S.E. 2d 111 (N.C. App. 1981) 4

State v. Kaluna
520 P. 2d 51 (Hawaii 1974) 3

United States v. Bloomfield
594 F. 2d 1200 (8th Cir. 1979) 5

Table of Cases (cont'd)

United States v. Chadwick
433 U.S. 1,
97 St. Ct. 2476,
53 L. Ed. 2d 538 (1977) 3, 5

United States v. Lipscomb
435 F. 2d 759 (5th Cir. 1970) 6

United States v. Monclavo-Cruz
622 F. 2d 1285 (9th Cir. 1981) 5

United States v. Ross
No. 80-2209 (31 Cr. L. 3051)
(Decided June 1, 1982) 4, 5

Warrix v. State
184 N.W. 2d 189 (Wis. 1971) 7

STATEMENT OF THE CASE

The respondent agrees that the facts of the case are as set forth by the petitioner except that the petitioner has failed to note that the small piece of paper that was seized in this case was found lying loose between the folds of Gelvin's wallet during the jailhouse search. The decision of the North Dakota Supreme Court took notice of that fact. (State v. Gelvin, 318 N.W. 2d 309 (N.D. 1982) and Appendix, p. A.2)

REASONS FOR DENYING WRIT

I. THERE IS NOT SIGNIFICANT CONFLICT OR CONFUSION BETWEEN THE STATES AND THE FEDERAL CIRCUITS AS TO THE SCOPE OF THE JAILHOUSE INVENTORY SEARCH EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT.

This case involves the search of a detainee's wallet at a jail pursuant to the inventory search exception to the warrant requirement of the Fourth Amendment. It is important to note that in making its decision, the North Dakota Supreme Court noted that the small piece of paper which was seized, was found lying loose between the folds of the wallet. State v. Gelvin, 318 N.W. 2d 302, 304. (See Appendix to Petition for Writ of Certiorari, p. A10)

The petitioner has cited numerous cases and argues that those cases demonstrate the existence of a conflict between the states and the federal circuits as to the nature and scope of jailhouse inventory searches. In fact, a careful reading of those cases does not support the petitioner's contention. The petitioner cites a number of cases to demonstrate that some states have restricted the scope of the jailhouse inventory. Those cases either are based on state constitutions or deal with searches incident to arrest or automobile inventory searches. The petitioner does not cite a single state court decision which would disallow the search of a wallet during a jailhouse inventory search on federal constitutional grounds.

The petitioner places great reliance on Reeves v. State, 599 P. 2d 727 (Alk. 1979) which the petitioner correctly reads as adopting a very restrictive scope for jailhouse inventory searches. In that case, however, the Alaska Supreme Court noted at 599 P. 2d 734:

It is not at all certain that the United States Constitution, as presently construed, places any significant limitations on the scope of an inventory search conducted pursuant to a custodial arrest.

The court went on to analyze and delineate the scope of a jailhouse inventory search in the framework of the guarantees of the Alaska State Constitution, which the court held to have a broader guarantee against unreasonable searches and seizures than that of the Fourth Amendment to the United States Constitution.

Likewise, the petitioner claims the State of Hawaii is particularly restrictive in the scope allowed in inventory searches. In State v. Kaluna, 520 P. 2d 51 (Hawaii, 1974) the Hawaii Supreme Court held that both the scope of jailhouse inventory searches and the scope of searches incident to lawful arrest were narrower under the State Bill of Rights than would be allowed by the Federal Bill of Rights.

The petitioner also argues that the State of Illinois is restrictive in the scope of jailhouse inventory searches. In support of that contention he cites People v. Redmond, 390 N.E. 2d 1364 (Ill. 1st Dist. 1979) which deals not with a jailhouse inventory search, but with a search incident to arrest. In that case it was held that a search of a defendant's purse which was recovered from the street after the defendant was handcuffed and seated in the backseat of a squad car could not be justified as a search incident to a lawful arrest. The petitioner also cites People v. Bayles, 411 N.E. 2d 1346 (Ill. 1980). That case deals specifically with inventory searches of containers taken from vehicles. In that case the Illinois Supreme Court, relying on United States v. Chadwick (1977), 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538, and Arkansas v. Sanders (1979), 422 U.S. 753, 99 S.Ct. 2586, 61 L.Ed. 2d 235, held at 411 N.E. 2d 1352:

> A warrant is generally required for the search of luggage or any container of personal effects. The warrantless search of such a container, therefore, will be deemed unconstitutional unless it can be justified under an established exception to the warrant requirement. The mere fact that the container is found in a vehicle or is seized subsequent to an arrest based upon probable cause will be insufficient to bring the warrantless search within the automobile exception or the search-incident-to-an-arrest exception.

While such a conclusion may reasonably have been drawn at the time Bayles was decided, it should be noted that on June 1, 1982, in United States v. Ross, No. 80-2209 (31 Cr. L. 3051) this Court held:

> When a legitimate search is underway, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest of prompt and efficient completion of the task at hand.

This Court went on to note:

> [T]he protection afforded by the (Fourth) Amendment varies in different settings. The luggage carried by a traveler entering the country may be searched at random by a customs officer; the luggage may be searched no matter how great the traveler's desire to conceal the contents may be. A container carried at the time of arrest may often be searched without a warrant and even without any specific suspicion concerning its contents.

In State v. Hall, 279 S.E. 2d 111 (N.C. App. 1981), cited by the petitioner, a North Carolina Appellate Court limited

the scope of an inventory search of a vehicle and relied, in part, on the District of Columbia District Court decision in United States v. Ross, supra, which was reversed by the U.S. Supreme Court on June 1, 1982.

The decisions limiting the scope of automobile inventory searches cited by the defendant rely on United States v. Chadwick, supra, and Arkansas v. Sanders, supra. In Sanders this court had hinted that warrantless search of a container found in an automobile could not be upheld as part of a warrantless search of an automobile itself. That determination, however, has been done away with in U.S. v. Ross, supra, and it is the contention of the respondent that those cases would be decided differently today in light of the Ross, supra, decision.

The defendant has failed to demonstrate a conflict between state courts concerning the scope of jailhouse inventory search. While both Alaska and Hawaii have restricted the scope of such searches, they have done so on state constitutional grounds. One case cited as limiting the scope of such searches is a search incident to arrest case and the others deal with automobile inventories and not jailhouse inventories.

The petitioner has also failed to demonstrate a conflict between the Federal Circuits. He cites United States v. Bloomfield, 594 F. 2d 1200 (8th Cir. 1979) and concludes that under the reasoning set forth in that case, the search of a wallet during a jailhouse inventory would be permitted. The petitioner then cites United States v. Monclavo-Cruz, 662 F. 2d 1285 (9th Cir. 1981) in which it was held that a purse could not be searched during a jailhouse inventory search. The court in Monclavo-Cruz specifically noted, however, that the scope of a jailhouse inventory search could include the search of a wallet.

II. THE INVENTORY SEARCH OF GELVIN'S WALLET AND THE SEIZURE OF THE ALLEGED CONTROLLED SUBSTANCE THEREIN, WAS A REASONABLE SEARCH AND SEIZURE.

This case involves the search of Gelvin's wallet at a jail pursuant to the inventory search exception to the warrant requirement of the Fourth Amendment. As stated by the petitioner, the principle of the inventory search was first set forth by the United States Supreme Court in the case of South Dakota v. Opperman, 428 U.S. 364, 49 L.Ed. 1000, 96 S. Ct. 3092 (1964). The grounds for such an inventory are:

1. Protection of the detainee's property while it remains in police custody.
2. Protection of the police against claims and disputes over lost and stolen property.
3. Protection of the police from potential danger.

In United States v. Lipscomb, 435 F. 2d 795 (5th Cir. 1970) the Court of Appeals for the Fifth Circuit held:

> It cannot be denied that to prevent escape, self-injury, or harm to others, the police have a legitimate interest in separating the accused from the property found in his possession. An inventory is then necessary both to preserve the property of the accused while he is in jail and to forestall the possibility that the accused may later claim that some item has not been returned to him.
>
> Lipscomb at 800.

In State v. Entsminger, 160 N.W. 2d 480 (Iowa, 1968) the Iowa Supreme Court held:

> The question is whether in all the circumstances of this 'booking' process defendant's right to personal security was violated by an unreasonable search and seizure . . .
>
> This is standard and necessary under modern police practice which calls for a thorough search at the station house of any person who is taken into custody. Such searches are not unreasonable; they are an integral part of efficient police procedure. These circumstances rendered initiation of the search and seizure permissible to the extent used here. The scope of this search was strictly tied to and justified by this 'booking' procedure.
>
> Entsminger, at 483-4.

In Warrix v. State, 184 N.W. 2d 189 (Wis. 1971) the Wisconsin Supreme Court found that custodial inventory search was reasonable, if it bore a reasonable relationship to jail custodial purposes. The Court held:

> [T]his court . . . has upheld a custodial search of the person on the ground it was required for the safety of the prisoner and the law enforcement officers and by the efficient operation and administration of a jail. Such custodial serach after arrest must bear a reasonable relationship, not to arrest, but to jail custodial purposes and one of the custodial requirements is the inventorying of possessions belonging to the accused and placing them in safekeeping during his custody in jail. If contraband or evidence or fruits of a crime are found in this process, the discovery does not make the search unreasonable. (citation omitted)
>
> Warrix, at 194.

In People v. Walker, 228 N.W. 2d 443 (Mich. 1975) the Michigan Supreme Court considered a case in which a tinfoil packet was taken from a defendant during an inventory

search and opened. The court held at 228 N.W. 2d 446:

> The subsequent opening of the packet does not remove this particulary search from the protective scope of the jailhouse inventory exception to the warrant requirement. It would be naive and pointless to assume that law enforcement officials may store an arrestee's personal effects without first determining what it is they are inventorying. (emphasis added)

In the case now before the court, the small piece of paper taken from Gelvin's wallet was lying loose in the folds of the wallet, and was the type of item (like currency or credit cards) which could easily have been lost had an inventory search not been performed. The North Dakota Supreme Court limited its decision in this case as follows:

> Although we express no opinion as to the propriety of closed or locked containers in general, we hold that it was proper for the officers in this case to inventory the contents of Gelvin's wallet.
>
> State v. Gelvin, 318 N.W. 2d 302, 305.

For those reasons, should the court determine there is some need to review the scope of jailhouse inventory searches, the present case is a poor case for such a review.

CONCLUSION

There is not significant conflict between various state courts as to the scope of jailhouse inventory searches, nor does such a conflict exist between the Federal Circuits.

Jailhouse inventory searches are reasonable and necessary to protect a detainee's property while it remains in police custody, to protect the police against claims and disputes over lost and stolen property and to protect the police from danger. The scope of such searches must be such that those purposes can be accomplished and limiting peace officers from searching a wallet, particularly a wallet with items loose in the folds, would defeat those purposes.

For the reasons stated above and upon the basis of the cases cited herein, the respondent respectfully asks that Writ of Certiorari be denied.

Dated this 26th day of August, 1982.

/s/ John M. Olson

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CERTIFICATE OF SERVICE

The foregoing Response to a Petition for a Writ of Certiorari was served by mailing a true and correct copy thereof to:

(3 copies)
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(1 copy)
Luella Dunn, Clerk
N. D. Supreme Court
State Capitol
Bismarck, North Dakota 58505

(40 copies)
Alexander L. Stevas, Clerk
U. S. Supreme Court
Supreme Court Building
Washington, D. C. 20543

and same having been placed in the United States Mail with sufficient postage affixed, this 26th day of August, 1982.

/s/ John M. Olson

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